**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**PRIME HEALTHCARE SERVICES – ENCINO HOSPITAL, LLC d/b/a ENCINO HOSPITAL MEDICAL CENTER**

and **Case No. 31-CA-131701**
**31-CA-140827**

**SEIU UNITED HEALTHCARE WORKERS – WEST**

**PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL AND MEDICAL CENTER**

and **Case No. 21-CA-131714**
**31-CA-140844**

**SEIU UNITED HEALTHCARE WORKERS – WEST**

**PRIME HEALTHCARE CENTINELA, LLC d/b/a CENTINELA HOSPITAL MEDICAL CENTER**

and **Case No. 31-CA-131703**
**31-CA-141016**

**SEIU UNITED HEALTHCARE WORKERS – WEST**

# BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE LISA D. THOMPSON'S DECISION

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## I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondents Prime Healthcare Services - Encino, LLC d/b/a Encino Hospital Medical Center ("Encino"); Prime Healthcare Services - Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove") and Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center ("Centinela"; together with Encino and Garden Grove, the "Hospitals") respectfully submit this Brief in Support of Exceptions to the February 18, 2016 Decision of Administrative Law Judge ("ALJ") Lisa D. Thompson ("Decision").

The essence of ALJ Thompson's Decision is that the Hospitals committed an Unfair Labor Practice by refusing to execute an agreement reached with the Charging Party, SEIU-UHW West ("UHW"). The Board should not adopt ALJ Thompson's Decision because Richard Ruppert, the Charging Party's chief negotiator, stated that no agreement exists. On November 11, 2014, Mr. Ruppert wrote:

> I wanted to talk with you about the CD. Greg has said you say we have an agreement. ***We were very close but did not agree yet.***

(Respondent's Exhibit ("RX") 59(a) (emphasis added).) Neither the General Counsel nor the Charging Party have disputed Mr. Ruppert's statement.

Nor is there any question as to the materiality of the term to which the parties did not agree. The CD to which Ruppert refers is the "California Differential," a California payment practice that affects the overtime rate of pay for workers who work certain shifts. (*Id*.) ALJ Thompson found that the that the California Differential payment practice was a material term of the proposed agreement between the Hospitals and the Union. (Decision at 13:18-19.) And the ALJ explicitly found that the Hospitals and the Union had "not agreed on anything" regarding this critical term. (Decision at 14:12-14.) The ALJ's finding that there was no agreement

regarding a material term, coupled with Mr. Ruppert's affirmative acknowledgement that there was no agreement, makes possible only one conclusion – that the parties had not reached an agreement.

ALJ Thompson's Decision compounds the error by attempting to craft an analysis that the parties had agreed to maintain the status quo with respect to the California Differential. The fatal flaw in that analysis is that it is contrary to the position taken by the Charging Party. The Charging Party argued that the agreement it alleged had been formed had ***changed the status quo.*** (SEIU-UHW West's Posthearing Brief at 18.) ALJ Thompson's finding that there was a meeting of the minds on a contract that was contrary to the contract the Charging Party argued had been formed is a factual and legal impossibility.

ALJ Thompson's Decision is based on numerous additional obvious errors of fact and law. Indeed, what is striking about the opinion of ALJ Thompson is that it is contrary to Board law and the record evidence on virtually every material point. Although the Hospitals address these issues below, they are not necessary to the disposition of this case because of the clarity of Ruppert's e-mail – the parties "did not agree." That is the beginning and the end of this story – the Hospitals cannot be found liable for an unfair labor practice as a matter of law for refusing to execute an agreement that the Charging Party stated did not exist.

As ALJ Thompson's Decision is replete with errors of law and fact, the Hospitals respectfully request that the Board refuse to adopt the ALJ's recommended remedy and dismiss the Complaint.

## II. STATEMENT OF THE CASE

### A. Initial Bargaining at the Three Hospitals

Prime Healthcare Services, Inc. ("Prime") is a health care company that owns and operates numerous hospitals, including three Southern California hospitals in Encino, Centinela,

and Garden Grove. Prime acquired Centinela in November 2007 from Centinela Freeman Healthsystems. Prime acquired Encino and Garden Grove from Tenet Healthcare Corporation in July 2008. (Hearing Transcript ("Tr.") 253:20-254:1.) The Hospitals had existing collective bargaining agreements with UHW in place at time of acquisition, but the Centinela agreement expired in 2009 and the Encino and Garden Grove agreements expired in 2011 without being renewed. (Tr. 254:5.)

Negotiations between Prime and UHW for successor collective bargaining agreements at the Hospitals had been ongoing since the Centinela agreement expired in 2009. Richard Ruppert was UHW's Chief Negotiator for Encino and Garden Grove for the entire course of the negotiations and for Centinela since 2011, when he took over from Denny Bush. (Tr. 258:17-22.) No dispute exists regarding Mr. Ruppert's status as the charging party stipulated that Mr. Ruppert was chief negotiator for UHW with respect to the collective bargaining agreements at all three hospitals. (Tr. 57:9-20; 100:6-7; 256:17-22, 259:7-10) . Mary Schottmiller was Chief Negotiator for Prime since January 2010, when she began working for Prime. (Tr. 261:2-3.) The parties were negotiating the Centinela, Encino and Garden Grove agreements as a single package because the agreements were very similar. (Tr. 311:12-16; Joint Exhibit ("JT") 14-16).

By the summer of 2014, the negotiations had basically "stalled out." (Tr. 175:15-18.) One of the critical points in the negotiations on which the parties could not agree was the "California Differential." The "California Differential" was a pay practice instituted in California in 2000 in which employers were required to pay overtime after eight hours worked in a day. (Tr. 255: 3-7.) The pay practice remained in place in the in the expired Centinela CBA, but had ended at Encino and Garden Grove. (Tr. 255:10-14.)

The California Differential was of great concern in California hospitals, as it had resulted in numerous lawsuits against hospital employers resulting in large settlements. (Tr. 255:19-256:1, 257:7-15.) Indeed, Centinela was among the hospitals that had faced a lawsuit relating to this pay practice, a lawsuit which the hospital ultimately settled for $1.2 million. (Tr. 256:2-4; 257:7-258:6.)

Ms. Schottmiller testified without contradiction that during the negotiations, she discussed the California Differential issue with Mr. Ruppert approximately fifteen times. (Tr. 263:9-16.) The California Differential issue was a complicated one because of how any change could negatively affect the employees' compensation. Throughout negotiations, Ms. Schottmiller and Mr. Ruppert discussed various possibilities for eliminating the California Differential while still keeping employees whole. (Tr. 264: 7-9.)

By October 2014, the parties still had a number of outstanding issues on which they were exchanging bargaining proposals, without much success. (RX-80.) On August 23, 2014, Ms. Schottmiller received an e-mail from Mr. Ruppert with the Union's latest proposal regarding the California Differential. (RX-101.) Prime presented a counterproposal on the California Differential to the Union on October 24, 2014. (Tr. 268:10-13; RX-88.) Mr. Ruppert did not respond to Prime's proposal until November 11, 2014, when he e-mailed Ms. Schottmiller to notify her that there was no agreement on the California Differential. (Tr. 270:7-9.)

### B. Prime's Agreement to Acquire the DCHS Hospitals Revives the Stalled Negotiations

On October 10, 2014, Prime entered into an agreement to purchase several hospitals in the Daughters of Charity Healthcare System ("DCHS"). Because the DCHS hospitals were non-profit charity hospitals, California law required the Attorney General of California, Kamala Harris, to approve the transaction. (Tr. 177:21-178:5.) UHW made it known that it would

oppose Prime's acquisition of the DCHS hospitals. (Tr. 178:14-21.) Prime believed that obtaining UHW's support would facilitate gaining the approval of the Attorney General for the Prime-DCHS transaction. (Tr. 281:20-22.)

In order to obtain the support of UHW, Prime initiated negotiations with UHW. Throughout October and November of 2014, spurred on by the pending DCHS deal, Prime and UHW engaged in negotiations to resolve all outstanding disputes between the parties in comprehensive agreement. As a part of these negotiations, Prime and UHW also tried to reach an agreement on a "Master" CBA for the DCHS Hospitals, to take effect in the event Prime's acquisition of the DCHS Hospitals was approved.[1] (Tr. 65:25-66:6.) The discussions took place on an accelerated basis because the parties believed that the Attorney General's decision on the DCHS transaction was imminent. (Tr. 332:21-333:1.)

The negotiations were led directly by the parties highest ranking officers -- the CEO of Prime, Dr. Prem Reddy and the president of UHW, Dave Regan. (Tr. 181:24-182:6.) That Dr. Reddy led these negotiations was a unique event as Dr. Reddy did not participate in normal collective bargaining issues. Similarly, Mr. Regan's participation was an extraordinary event. In all her years of bargaining with UHW, Ms. Schottmiller had never even met Mr. Regan, let alone have him directly involved in negotiations. (Tr. 292:14.) The involvement of the CEO of Prime and the President of UHW in the negotiations made it clear that Dr. Reddy had final approval authority for Prime on a global settlement agreement. (Tr. 182:22; 291:23-292:3.)

The parties generally referred to the comprehensive agreement which was the subject of the negotiations as the Memorandum of Understanding ("MOU"). (RX-3) The key provisions of the MOU were:

[1] While the parties had several meetings and exchanged drafts of the Master DCHS Agreement, it was never finalized. (Tr. 306:24-307:18; JT-5.)

- A Code of Conduct, which included things such as non-disparagement, to govern relations between the parties. (RX-3, Section 1.)

- A set of financial performance goals the Union had to meet to trigger certain benefits of the MOU. (RX-3, Section 2.)

- Resolution of outstanding litigation and ULPs between the parties. (RX-3, Section 3.)

- A timeline for UHW organizing other Prime hospitals. (RX-3, Section 4.)

In addition, certain agreements between Prime and UHW were intended to be attached as appendices to the MOU:

- A Master Collective Bargaining Agreement for the DCHS hospitals, to be attached as Appendix A. (RX-3, Section 2.B; Tr. 294:16-18.)

- A Collective Bargaining Agreement for Centinela, Encino and Garden Grove, to be attached as Appendices B, C, and D. (RX-3, Section 2.C; Tr. 184:2-13.)

- An Election Procedures Agreement setting forth a non-statutory procedure and timetable for an election, including a neutrality agreement to be attached as Appendix E. (RX-3, Section 4; Tr. 295:25-296-9.)

As the agreement was intended to be a comprehensive resolution of all issues, the MOU also made clear that the promises contained therein the were "interdependent and that each promise and covenant given by a Party is in exchange for all of the promises and covenants given by the other Party." (RX-7, at 2.)

The negotiations over the hospital contracts, including DCHS, as part of the MOU was an issue which created significant difficulties. Because Prime was making substantial economic concessions in the agreements for the three hospitals in exchange for the economic benefits it anticipated would flow from the DCHS acquisition, Prime sought to make the hospital agreements effective only on the successful completion of the DCHS acquisition. (Tr. 205:1-18.) UHW, however, wanted the agreements to take effect immediately. (Tr. 211:10-17.)

The parties' difficulty in reaching agreement on the effective date of the hospital agreements is reflected in the language the parties exchanged on this issue. As initially drafted, the MOU provided that the hospital CBA's would go into effect within 60 days of Prime's acquisition of DCHS. (JT-7.) On November 6, the Union rejected Prime's proposal and stated that the CBAs at Centinela, Encino and Garden Grove "need to be implemented immediately upon ratification."[2] (JT-9.)

Prime explained that it could not agree to such a term because the terms sought by the Union for these hospitals did not make economic sense if the DCHS acquisition was not completed. (Tr. 205:1-18.) In fact, Prime made this economic trade-off explicit in a revision of the MOU sent to UHW by Joseph Turzi, outside counsel to Prime, on November 6:

> The Parties acknowledge that the terms in the agreements referenced in 2.H [the Centinela, Encino and Garden Grove Agreements] are negotiated in the context of this Agreement and are acceptable to Prime because of the additional economic and non-economic benefits accruing to Prime by virtue of this Agreement. Consequently, these agreements will not have any force or effect unless and until this Agreement becomes effective.

(JT-6, Section 2.I.4**.**)

UHW was adamant that the agreements need to be effective immediately. In an attempt to break the logjam, on November 7, Prime sought to overcome this problem by offering a two-tier solution, with one tier becoming effective upon ratification with a second tier with more favorable terms effective upon acquisition of the DCHS hospitals. (JT-10.) In proposing this solution, Prime reiterated its concern "that it will have negotiated agreements on more favorable terms than it would have obtained but for this deal." (*Id*.)

While the global issues were being discussed by the principals, the urgency of the negotiations led the parties to work in subgroups on the appendices to the MOU in order to

[2] All dates are 2014 unless specifically noted otherwise.

expedite the negotiations. Specifically, Dr. Reddy and Mr. Regan charged other persons with completing the appendices that were to be incorporated into the final MOU. (Tr. 63:20-64:7.) Ms. Schottmiller, and Mr. Turzi were tasked with negotiating the Election Procedures Agreement appendix with the Union's outside counsel Bruce Harland. (Tr. 200:13-19.) The parties ultimately reached agreement on Elections Procedures Agreement, but it was not signed. (Tr. 200:20-201:3.)

A second such effort involved the negotiations for collective bargaining agreements for all of the hospitals, including those involved in the pending DCHS acquisition. (Tr. 270:16-27:1, 306:25-307:18.) Dr. Reddy tasked Ms. Schottmiller to work with UHW to complete agreements that were to be appendices to the final MOU, including Centinela, Encino, Garden Grove, and the DCHS hospitals. For his part, Mr. Regan assigned Greg Pullman, UHW's Chief of Staff, to work with Ms. Schottmiller on these issues for Centinela, Encino, and Garden Grove. (Tr. 63:20-64:7.) While Mr. Pullman was assigned this role, he acknowledged that the Union's chief negotiator Mr. Ruppert was "more informed about the details" of the previous negotiations between the parties. (Tr. 103:9-16.)

On or about November 6, the Union sent a draft term sheet relating to the hospitals entitled "Centinela, Encino, Garden Grove." (RX-6.) In that term sheet, which was sent back and forth between the parties, the Union proposed that the parties accept tentative agreements previously reached by the parties. Prime responded that the parties should "bring everything back to status quo . . . ." Illustrating the unique nature of the negotiations, UHW's counsel Mr. Harland "agreed that the easiest way to deal with this is just to return to status quo, and not be bound by TA's." (RX-6, at 3.)

Of critical importance, however, UHW expressly excluded the California Differential from any agreement to return to the status quo in their final response on the November 6 term sheet. The Union stated on the term sheet that "The only exception to the status quo issue is the California differential, and I know you wanted this changed." (RX-6, at 3.) The Union then proceeded to make a proposal to deal with changing the California Differential. Mr. Harland stated "[w]hat I would suggest is that, for this issue only, the parties agree to meet within 60 days of ratification and talk about a resolution to the issue." (RX-6, at 3.)

Ms. Schottmiller countered Mr. Harland's proposal in an e-mail sent to Mr. Pullman on November 7. Attached to the e-mail was a table entitled "Centinela, Encino and Garden Grove Settlements" detailing Prime's position on 12 different items. In that counter-proposal, Ms. Schottmiller expressly rejected the Union's proposal that the parties address the California Differential after ratification. Ms. Schottmiller stated in no uncertain terms that "[t]his needs to be completed now. I don't want to go back to the table on this issue. I thought we were almost at 100% agreement on this issue." (RX-24 at 4; RX-30.) In response, Mr. Pullman stated he needed a proposal on the California Differential issue. (RX-44.)

Later on November 7, Ms. Schottmiller sent a revised version of this table, adding the note that "she already T/A'ed a proposal with Richard [Ruppert] on how it would work." (RX-44; Tr. 325:4-10.) Mr. Pullman replied "we can verify tomorrow or send T/A." (RX-66.) The issue was never verified as Ms. Schottmiller had no further negotiation with Mr. Pullman concerning the California Differential. (Tr. 327:10-328:1.) As it turned out, Ms. Schottmiller was incorrect, as the last exchange on the California Differential was Ms. Schottmiller's October 24 proposal, which Mr. Ruppert had never accepted. (Tr. 389:21-390:2.)

The e-mail chain discussing the table sent by Ms. Schottmiller contained an e-mail from Mr. Pullman to Ms. Schottmiller on November 8. The e-mail made a rather standard house-keeping statement that if the parties did not change any language, the unchanged language would remain in effect:

> I just want to confirm that everything not explicitly changed here would go back to the current contract language. There are a few things that are not on your list where I understand you had proposed changes including Sub-Contracting, Temporary Hires, Job Posting, and Patient Care and Health and Safety committees. I don't know that we need to list them all but we should say that anything not referenced as a change here reverts to current contract.

(JT-1 at 5; Tr. 73:11-17). Ms. Schottmiller replied "I'm good with that." (*Id*.)

Around November 8, in the course of these discussions, Prime determined that it no longer needed the MOU because Prime was confident that it would gain approval for the DCHS acquisition regardless of the UHW's support. (Tr. 215:11-22; 330:8-20.) However, it was still "critical" to Prime that it reach agreement on the Master DCHS CBA with UHW due to labor cost issues at the DCHS facilities. (Tr. 214-216, 330:8-20.) In other words, Prime still needed a comprehensive settlement on the collective bargaining agreements, including the DCHS agreements, but not the neutrality and election agreement sought by the Union in the MOU.[3]

Subsequently on November 8, Mr. Pullman sent a new version of a Term Sheet covering Centinela, Encino and Garden Grove to Ms. Schottmiller. (JT-1.) Mr. Pullman forwarded this version of the term sheet with an e-mail stating "I think this captures everything we agreed to and I'm hoping we can sign off on it tomorrow along with the other documents." This version of the term sheet, which had signature lines for both Prime and the Union, was formatted as a bullet-point list of 16 terms.

[3] Prime and UHW never reached agreement on the MOU, although discussions occurred until sometime in February of 2015. (Tr. 223:6-14.)

The term sheet specifically referenced the California Differential as an item that the parties had specifically dealt and on which they had an agreement. That section read "[t]he California Differential solution agreed upon at Centinela will be included." (JT-2, at 51.) One bullet point of the term sheet made clear that the items listed on the term sheet, including the California Differential were treated differently from the status quo, stating that "[a]ll terms and conditions of the previous collective bargaining agreements will be the terms for the new agreement except where otherwise state in this document." (JT-2.)

The absence of detail regarding the California Differential on the term sheet appears to have been the result of Mr. Pullman's lack of understanding of the issue. Mr. Pullman testified that he did not know the specifics of any agreement reached on the California Differential issue and that Mr. Ruppert and Ms. Schottmiller would have been the persons with knowledge about any such agreement. (Tr. 110:4-14.) Mr. Pullman testified that he was not even aware if California Differential was a term of any of the expired CBAs at the three Respondent Hospitals. (Tr. 110:23-111:6.)

On November 10, Ms. Schottmiller sent Mr. Pullman and Mr. Harland an e-mail attaching a version of this term sheet, stating "We are in agreement with the attached, even absent a signed MOU…. Let me know if you are ready to execute the CBAs this week." (JT-2.) Later on November 10, at 12:37 p.m., Mr. Pullman sent a revised version of the term sheet for signature to Ms. Schottmiller. Ms. Schottmiller responded that "We are good to go. I'm in negotiations today, so I will sign tomorrow." (JT-2.) After an exchange regarding some language on the term sheet involving grievances, Mr. Pullman sent Ms. Schottmiller a version of the term sheet signed by Mr. Pullman with the California Differential language described above at 10:13 p.m. on November 10. (JT-2.) Neither the General Counsel nor the Charging Party

introduced any evidence of any kind that Prime had relinquished its position that it needed to complete the DCHS agreements in addition to the agreements for the three Hospitals.

### C. UHW's Chief Negotiator States the Parties Did Not Reach an Agreement

On November 11, at 8:39 a.m., UHW's chief negotiator Richard Ruppert sent Ms. Schottmiller an e-mail entitled "California Differential." (RX-59(a); Tr. 277:19-278:4.) Mr. Ruppert's e-mail explicitly stated that the parties had no agreement on the California Differential issue, and explains in details the proposals the parties exchanged, their differences on the subject, states that Prime's most recent proposal is not acceptable to UHW, and submits a new proposal for consideration by Prime. (RX-59(a), Tr. 278:6-9). The e-mail in its entirety reads as follows:

> I wanted to talk with you about the CD. Greg has said you say we have an agreement. ***We were very close but did not agree yet.***
>
> Here's where I think we left it.
>
> We proposed this
>
> Elimination of California Differential and prior 12 hour pay practices.
>
> New 12 Hour Alternative Work Schedule
>
> The new base rate for use in this Agreement for all 12 hour employees will be the base rate of pay that was in effect immediately prior to the effective date of the Agreement plus the California differential. The California differential is the difference between the base rate and the base rate divided by .8576. Therefore, for twelve (12) hour employees, the base rate as used in this Agreement will be the sum of the pre-existing base hourly rate of pay and the California differential rate. In combining the California differential rate and the pre-existing base hourly rate of pay to create a new base rate of pay, employees shall not experience any reduction of compensation or benefits as a result of the conversion. Any loss will be corrected.
>
> You accepted the proposal but added the following heading-
>
> "In the event that an employee's base rate does not increase after the ratification of a new bargaining agreement, the following will be in effect."

> This language pretty much nullifies the CD agreement since everyone will get an increase via scale placement or 3%.
>
> ***<u>It would leave it as it is for the CD and I know that is not your intent</u>***
>
> In a brief discussion I asked you were saying that an effected employee could not receive the both the scale increase as a result of placement on the scale or 3% and the CD base rate change and it seemed that was the intent.
>
> So we were going to propose that a 12 hour employee will receive either the minimum 3% increase, an increase based on placement on the scale or the CD base rate change, whichever increase was greater. Those currently on the California Diff would have the base rate combined with the CD and then would receive either the 3% or the scale placement which ever was greater.
>
> Please give me a call. I am not trying to bargain the settlement proposal but ***<u>we both have to be clear on the CD settlement.</u>***
>
> I am sure you are exhausted please be assured I am trying to make this move forward.
>
> I think a conversation can clear it up.

(RX-59(a) (emphasis added).) In this e-mail, Mr. Ruppert interpreted Ms. Schottmiller's October 24th counterproposal as "nullifying" the Union's proposal for a California Differential pay adjustment. (RX-59(a).)

Later on November 11, Ms. Schottmiller responded to Mr. Ruppert's e-mail, essentially agreeing with Mr. Ruppert's position on the absence of an agreement. Ms. Schottmiller informed Mr. Ruppert that she had told Mr. Pullman that they could not reach agreement for the Hospitals until the parties also had agreed on the Master DCHS CBA. (Tr. 287:22-25; RX-59.) The need to reach agreement on the DCHS CBA was necessary to ensure that Prime would receive the overall benefit of its bargain from the broader negotiations given the concessions it made in the agreement for the Hospitals. Mr. Ruppert's response on November 12, 2014 was "[n]evertheless I'd like to get this behind us." (RX-59; Tr. 288:4.) The very next day, on

November 12, 2014, ignoring their own Chief Negotiator's assertion that there was no agreement, the UHW filed ULP charges arguing that the parties had reached an agreement. (RX-115.)

## I. ARGUMENT

### A. UHW is Bound by its Chief Negotiator's Statement That There Was No Agreement

"A collective-bargaining agreement is formed only after a meeting of the minds on ***all*** substantive issues and material terms of the contract." *Intermountain Rural Electric Association*, 309 N.L.R.B. 1189, 1192 (1992) (emphasis added). UHW's own statements establish beyond dispute that there was no meeting of the minds between Prime and UHW.

It is too obvious to require discussion – the written statement of UHW's chief negotiator, Richard Ruppert, that there was no agreement between Prime and UHW on the California Differential precludes any finding that there was an agreement. Mr. Ruppert's November 11 e-mail is clear and unambiguous. "***We were very close but did not agree yet."*** It is difficult to imagine how a refutation of the UHW's claim that the parties had reached an agreement made by the chief negotiator of UHW could be any more clear or binding. [4]

But if there was any doubt, Mr. Ruppert eliminates that doubt when he went even further, explaining in great detail exactly how there was not an agreement. He lays out the stark differences in the parties' respective positions on the subject, and states that Prime's most recent proposal is not acceptable to UHW. And then to drive the matter home, he submits a counter-proposal, an act which under the most basic principles of contract law precludes the formation of

[4] Tellingly, despite acknowledging that Richard Ruppert was the chief negotiator for the Union, neither the General Counsel nor the Charging Party called Mr. Ruppert as a witness. It is well established that the failure of a witness to appear on behalf of a party for whom he would be expected to give favorable testimony may appropriately give rise to an adverse inference that the witness's testimony would be unfavorable. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 405, AFL-CIO*, 328 N.L.R.B. 788, 788 n. 2 (1999),

any contract if not accepted by the other side. In other words, Mr. Ruppert demonstrated how his position that the parties did not have an agreement was supported by the facts. [5]

ALJ Thompson appears to have ignored the dispositive nature of Mr. Ruppert's statements, and instead relied on the generic housekeeping statement in Mr. Pullman's November 8 e-mail that anything that was not changed would revert to the status quo. ALJ Thompson erroneously concluded that despite Mr. Ruppert's clear, detailed, and fully explained position, the generic, boilerplate statement of Mr. Pullman was controlling. She did so despite Mr. Pullman's admission that he not understand the California Differential at issue and that it was Mr. Ruppert who was responsible for negotiating that issue for UHW.

### B. ALJ Thompson's Decision is Unsupported by the Record, Contrary to Board Law, and Internally Inconsistent.

While Mr. Ruppert's disavowal of the agreement is dispositive, the record also mandates a conclusion that the parties had not reached an agreement. The errors of law and fact in ALJ Thompson's Decision are so numerous and obvious that they can be dealt with below in summary fashion.

***ALJ Thompson incorrectly held that an agreement that was reached was based on the status quo of the existing agreement. (Decision at 14:15-21.)*** This finding is an impossibility because the Charging Party itself disagrees. The Union argued in its Posthearing Brief that an agreement had been reached that would eliminate the California Differential, not retain it.

> The bargaining history demonstrates that Prime wanted the California Differential eliminated at Centinela with the settlement of the contract, ***and that UHW agreed to eliminate it.***

[5] There could not have been tentative agreement based on Ms. Schottmiller's October 24th proposal prior to Mr. Ruppert's November 11 e-mail, as the proposal had never been accepted or even responded to by the Union.

(UHW Posthearing Brief at 18 (emphasis added).) ALJ Thompson's finding of an agreement based on the existing status quo is clear error as it is at odds with the position of ***both*** parties to the alleged agreement.

***ALJ Thompson improperly imposed an agreement on the parties. (Decision at 14:17-19.)*** Given that the Charging Party argued for a different agreement than the one found by ALJ Thompson, the conclusion is inescapable that ALJ Thompson created the agreement for the parties. That is contrary to established Board law -- the Board does not have the power to compel an employer to agree to any substantive contractual provision of a collective-bargaining agreement. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); *see also Interprint Co*., 273 N.L.R.B. 1863, 1864 (1985) (reversing decision where judge had "written the contract for the parties").

ALJ Thompson's improper creation of an agreement where none exists is evidenced further by her express recognition that the parties' own agreement deviated from the status quo. Specifically, ALJ Thompson acknowledges that the term sheet referenced a tentative agreement on "how to apply overtime wages without the differential . . ." (Decision at 14:8-9.) However, ALJ Thompson rejected the parties' agreement because she found that referenced tentative agreement had never been reached by the parties. (Decision at 14:11-13.)

Rather than stop there and accept the obvious absence of an agreement, ALJ Thompson created one for the parties based on Mr. Pullman's e-mail that anything not changed would revert to status quo. Whatever the meaning of Mr. Pullman's statement generally, one thing it cannot mean is that the status quo could form the agreement for the California Differential. The parties had agreed that the California Differential was an exception to the status quo. (RX-6, at 3.) Consistent with that exception, the parties sought to change, and ultimately believed they had

changed, the status quo. In this context, it is readily apparent that ALJ Thompson's Decision improperly created the "status quo" agreement from whole cloth.

***ALJ Thompson ignored the undisputed evidence that the parties expressly excluded California Differential from the status quo stipulation. (Decision at 13:27-33; 14:15-22.)*** ALJ Thompson's application of Mr. Pullman's "status quo" e-mail to the California Differential is obvious error. The parties expressly excluded the California Differential from any status quo obligation. The November 6 Term Sheet sent to Prime by Mr. Harland could not be more clear. It states that "[t]he only exception to the status quo issue is California Differential," and it acknowledges that Prime "wanted this changed." (RX-6.)

The structure of the November 8 Term Sheet that ALJ Thompson found to constitute an agreement underscores the exclusion of the California Differential from the status quo. The term sheet states that "[a]ll terms and conditions of the previous collective bargaining agreements will be the terms for the new agreement *except where otherwise stated in this document*." (JT-2) (emphasis added). What is "otherwise stated" in the document are 15 specifically negotiated points, one of which is the California Differential.

This undisputed record evidence effectively removes any basis for ALJ Thompson's finding of an agreement based on the status quo.

***ALJ Thompson erroneously ignores her own conclusions which compel a finding that the parties did not reach agreement. (Decision at 13:18-25, 14:8-14.)*** ALJ Thompson's Decision makes two explicit findings regarding the California Differential which compel a further finding that there was no agreement between the Hospitals and UHW as a matter of law. First, ALJ Thompson expressly found that the California differential was a material term of the agreement. (Decision at 13:18-19.) Second, ALJ Thompson explicitly found that "there is no

evidence anywhere in the record that the parties changed or finalized the language regarding the [California] differential. In essence, they really had not agreed upon anything regarding eliminating the differential." (Decision at 14:12-15.)

There simply cannot be an agreement where a material term is left unresolved.[6] *Intermountain Rural Electric Association*, 309 N.L.R.B. at 1192. As there was no meeting of the minds there can be no failure to execute. *See, e.g., Vermont Tel. Co.,* 348 N.L.R.B. 1278, 1281 (2006); *Luther Manor Nursing Home*, 270 N.L.R.B. 949, 958 (1984), *Springfield Elec. Co.*, 285 N.L.R.B. 1305, 1306 (1987). "A collective-bargaining agreement is formed only after a meeting of the minds on ***all*** substantive issues and material terms of the contract." *Intermountain Rural Electric Association*, 309 N.L.R.B. at 1192 (emphasis added).

ALJ Thompson seeks to circumvent this problem with her status quo analysis. Beyond the obvious problem discussed above that the status quo did not apply to the California Differential, there is the added problem that neither the General Counsel nor the Charging Party ever presented this argument regarding a reversion to the status quo. It is clear error for the ALJ to *sua sponte* decide this issue, which was neither raised nor litigated by the parties to this case. *Can-Am Plumbing, Inc.*, 350 N.L.R.B. 947, 949 (2009).

ALJ Thompson also read far too much into Mr. Pullman's e-mail when she held that the status quo applied unless the "parties changed or finalized the language regarding the [California] differential." That is not what Mr. Pullman's e-mail states. The e-mail states that "everything not explicitly changed here would go back to the current contract language" and "anything not referenced as a change here reverts to current contract." (JT-1; Tr. 73:11-17.) A

[6] It is beyond dispute that, the California Differential is a material term of any agreement between Prime and UHW as it affects the overtime wages of unit employees. The ALJ expressly found it to be material, which is confirmed by the record evidence. (Decision at 13:18-19; Tr. 108:2-7. 273:14-24, 274:8-15.) *See also Metro Mayaguez, Inc.,* 356 N.L.R.B. No. 150 at 16 (2011) (overtime pay is mandatory subject of bargaining).

review of the all of the documents exchanged by the parties in negotiating the terms of an agreement for the Hospitals illustrates that at a minimum, the parties had indeed "referenced" the California Differential on each document. (JT-1 at 7; JT-2 at 8; RX-6 at 3.) Thus, the clear language of the e-mail preclude the application of a status quo agreement for the California Differential.[7]

If anything, Mr. Pullman's e-mail is ambiguous as to when a matter would revert to the status quo. It also does not even remotely address the issue of what happens to a provision that was changed, but on which the agreement fails because one or all of the parties were mistaken. The burden is on the General Counsel to establish that the parties had in these circumstances reached an agreement to revert to the status quo. *See Windward School*, 346 N.L.R.B. 1148, 1150 (2006). As the General Counsel never presented this theory, much less introduce supporting evidence, the record simply fails to support ALJ Thompson's conclusion.

### C. ALJ Thompson Misapplied the Law Concerning Mistake

That the alleged agreement was voidable as it was based on a mutual mistake of fact is obvious. The parties variously believed that the parties had incorporated Prime's October 24 Proposal (Schottmiller and Pullman), that the status quo was the agreement (Pullman as attributed by ALJ Thompson), or that the California Differential had been eliminated (UHW in its brief). As the mistake of fact is patent and mutual, the mistake made any alleged agreement voidable, and Prime could not have violated the Act by refusing to sign the alleged agreement. *Blue Cross of California*, 32-CB-3226, 1990 WL 1222180 (N.L.R.B. Jan. 17, 1990).

[7] Taken at face value, ALJ Thompson's holding means that Prime's agreement to Mr. Pullman's e-mail constitutes a waiver of Prime's right to bargain over the California Differential. Such waivers must be clear and unmistakable, which it clearly is not in this case. *See, e.g., Columbus Elec. Co.*, 270 N.L.R.B. 686 (1984)

ALJ Thompson agreed that there was a mistake in the agreement. The ALJ found that the California Differential was a material term on which the parties belief that they had reached agreement was "incorrect." (Decision at 14:12-15.) What ALJ Thompson rejected was the argument that the mistake was mutual, holding:

> In this case, there was no mutual mistake as to the terms of the differential, because Pullman, who ultimately negotiated the final terms, was unaware of what Schottmiller and Ruppert previously negotiated regarding the differential. Thus, to the extent there was a mistake it was made by Respondents.

(Decision at 14:38-40.)

ALJ Thompson's conclusion that the mistake was not mutual exposes a clear error in her decision. Absent a mutual mistake, the November 8 term sheet was the agreement and no basis exists for ALJ Thompson's use of a "status quo" analysis to change the terms of that agreement. *Catholic Pioneer Church*, 341 N.L.R.B. 1034, 1038 (2004). However, ALJ Thompson's finding, supported by the record and Mr. Ruppert's e-mail, that the parties were "incorrect" in believing that Respondent's October 24 proposal was an agreement precludes any finding that the parties reached an agreement. In other words, either the parties never reached an agreement or the agreement was void as it was based on a mutual mistake. Either way, the Hospitals could not have failed to execute an agreement because the agreement did not exist.

Even if one accepts ALJ's Thompson's erroneous conclusion that any mistake was unilateral by Ms. Schottmiller, the contract nonetheless was voidable. A unilateral mistake on the part of one party will make an agreement voidable "where there is a mistake that on its face is so palpable as to put a person of reasonable intelligence on his guard." *Apache Powder Co*., 223 N.L.R.B. 191, 195 (1976). ALJ Thompson erroneously concluded that the Ms. Schottmiller's mistake was not so obvious to place the Union on notice of the mistake.

Such a conclusion is impossible to reconcile with Mr. Ruppert's reaction. The mistake was so palpable that only a few, short hours after the alleged agreement had been reached, the UHW's chief negotiator wrote Ms. Schottmiller to disavow any alleged contract and to explain in great detail why it did not exist, including a clear an unambiguous statement of Mr. Ruppert's knowledge that Prime did not intend for the agreement to be the status quo. (RX-59(a).) In other words, the mistake was obvious and instantly recognizable to Mr. Ruppert, a party with knowledge of the issue. *Apache Powder Co*., 223 N.L.R.B. at 195.

### D. ALJ Thompson's Finding that the Mary Schottmiller Had Authority to Bind the Hospitals is not Supported by Substantial Evidence

ALJ Thompson erroneously held that Ms. Schottmiller, as an agent of the Hospitals, had the authority to bind the Hospitals to an agreement for Centinela, Encino and Garden Grove. This finding ignores the evidence regarding the global settlement negotiations and the limited nature of Ms. Schottmiller's authority within the context of those negotiations.

In finding that Ms. Schottmiller had authority, ALJ Thompson stated:

> In this case, the evidence is clear that Schottmiller had (at minimum) apparent authority to negotiate (on Prime's behalf) with the Union on the successor CBAs for the three hospitals. Record evidence establishes that Schottmiller was one of the negotiators during the multiple meetings with the Union, Prime and DOC officials regarding the global MOU. When the DOC approbal process appeared imminent, Schottmiller was specifically instructed to engage the Union in separate negotiations on a CBA for Encino, Garden Grove and Centinela. In so doing, Schottmiller became Prime's chief negotiator, took the lead on responding to the Union's contract proposals and communicating Prime's counterproposals. Schottmiller also copied Reddy, Prime's CEO and ultimate decision maker, Sarian, Prime's President of Operations, and Schell, Prime's General Counsel on every proposal/counterproposal to the Union, and at no time, did any of them disavow her authority to act/negotiate on Prime's behalf. In addition, no one from Prime ever told the Union that Schottmiller needed permission from Reddy to negotiate/bind Prime to an agreement.

(Decision at 11:24-34.)

ALJ Thompson's rendition of the facts is completely consistent with the limited authority granted Ms. Schottmiller by Dr. Reddy in the presence of UHW's President David Regan. (Tr. 63:4-10, 138:18-21.) No question exists from the record that Ms. Schottmiller was tasked to enter into the negotiations with Mr. Pullman to prepare agreements that would be incorporated into the MOU. (Tr. 182:22). In this context, Ms. Schottmiller's historic status as Prime's lead negotiator for the three hospitals cannot be a basis for any finding of agency because that authority was explicitly restricted by Dr. Reddy in the superseding negotiations for the MOU.

Neither the General Counsel nor the Charging Party ever produced any witness or other evidence to challenge the point. What is absent from ALJ Thompson's opinion is any explanation of what changed in the limited agency expressly granted to Ms. Schottmiller by Dr. Reddy in the presence of Mr. Regan. As Mr. Regan, the President of UHW, was fully aware of Ms. Schottmiller's limited agency, no basis exists for apparent or other authority that exceeds the scope of this express limitation.

The only plausible basis for ALJ Thompson's finding of authority is her statement that no one from Prime ever told the Union that Ms. Schottmiller's authority was limited. Even if this finding was correct, which it is not, ALJ Thompson's conclusion is contrary to Board law, which does not require such notice "where, as here, the necessity for [additional] approval is clearly understood by the parties." *Morgantown Glass & Mirror, Inc.*, 177 N.L.R.B. 155, 155 (1969). It is difficult to imagine how a limitation could be more obvious than when Dr. Reddy, the CEO of the company, was leading the negotiations.[8]

[8] As Ms. Schottmiller's agency was limited, ALJ Thompson's finding on disavowal has no relevance to this case. The e-mails ALJ Thompson relies upon that were circulated to Mike Sarian and Troy Schell were sent only after an agreement allegedly was reached. The reaction from Prime was immediate -- less than 27 hours after sending this e-mail to the principals, Ms. Schottmiller clarified the scope of her authority by reiterating a need for a deal on the

Ultimately, what is evident from ALJ Thompson's opinion is that she got the agency issues exactly backwards. ALJ Thompson failed to give proper effect to the unequivocal statements of Mr. Ruppert, whom the Union stipulated was its Chief Negotiator, that there was no agreement. Yet, ALJ Thompson relied heavily on Ms. Schottmiller's assertion of an agreement, despite the record evidence that she had no such authority.

## II. CONCLUSION

For the foregoing reasons, the ALJ abused her discretion in finding that the Hospitals violated the Act as alleged in the Complaint. Accordingly, the ALJ's Decision should be reversed and the Complaint should be dismissed.

Respectfully Submitted,

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DCHS hospitals. (JT-4.) While not a complete disavowal, that statement reinforced the earlier grant of limited authority from Dr. Reddy.